U.S. DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

THE LAW OF ARREST, SEARCH, AND SEIZURE FOR IMMIGRATION OFFICERS

M-69

(Rev. January 1983)

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THE LAW OF ARREST, SEARCH, AND SEIZURE
FOR IMMIGRATION OFFICERS

This digest of statutory law and judicial precedents has been prepared by the General Counsel of the Service for the information and guidance of those officers whose duties in the administration of the immigration laws require them to make arrests, searches, and seizures.

Obviously, it would be impracticable in any manual prepared for daily use to include a consideration of every possible circumstance under which the authority of officers to make arrests, searches, and seizures might be challenged. The discussion which follows will therefore be limited to those situations which most frequently arise. So that there may be no question as to the sources of the authority exercised by any officer, the discussion of special situations is prefaced by a brief general review of the powers vested in the Attorney General and his delegation of them to designated employees of the Service.

Many of these areas of the law are in flux and have not yet been settled by the Supreme Court. In some instances, some lower federal courts have rendered decisions, while in other jurisdictions the matter has not been considered. Where there are decisions, they may be in conflict with each other. In these areas, the Service sometimes adopts a nationwide policy which does not test the limit of the law or the Constitution but is in conformity with one or more lower court decisions. Such a policy may be adopted even while an appeal of the decision is pending. An example is the policy requiring an officer to have a reasonable suspicion based on specific articulable facts that an individual is an alien before the officer may question him regarding his immigration status. The reasons for adopting this policy are the following:

(1) Economy. Our limited resources require us to focus our attention so that we produce the greatest result from the effort we expend. Random questioning is less likely to result in a high proportion of apprehensions of illegal aliens than is questioning directed at persons who clearly seem, on the basis of specific articulable facts, to be aliens.

(2) Protection of officers and the agency. If our policy is somewhat more restrictive than the Constitutional limit, or if it does not test that limit where that limit has not yet been determined by the Supreme Court, our officers are less likely to be involved in litigation over alleged violations of persons' Constitutional rights (Bivens suits). Also, such suits are less likely to be brought, saving the Department, the agency, and the individual employee the expense, time, and anguish which such litigation entails.

(3) Image. By conforming our actions nationwide to the requirements laid down by lower courts and not always exercising our authority to its very limits and testing those limits, a higher proportion of our contacts with citizens and lawful permanent residents will be in a non-confrontation setting. We should therefore be able to demonstrate to the public, the courts, and the media that the agency acts reasonably and with commendable restraint in the face of overwhelming enforcement responsibilities.

Of course, there are many instances where the Service does not adopt such a policy and instead restricts compliance with the lower court decision to the jurisdiction where the decision was rendered.

Questions regarding search and seizure requirements should be referred to the nearest Chief Legal Officer of the Service, the Regional Counsel, or the Office of General Counsel. The local United States Attorney and the Regional Counsel should be notified in advance of any enforcement activities which are expected to result in court litigation and/or public controversy. Early notification will insure the best possible legal support for the enforcement operation.

For purposes of clarity and readability, citations of authority have been placed at the end of each major division. Lengthy quotations have been avoided in the interest of brevity and because the standard Federal publications cited or referred to will be readily available in any law library, if not already in possession of Service officers.

SUMMARY OF IMMIGRATION OFFICER'S AUTHORITY UNDER THE FOURTH AMENDMENT, THE IMMIGRATION AND NATIONALITY ACT, AND INS POLICY

You may, without a warrant or consent:

1. question a person concerning his right to enter or be in the United States if you have a reasonable suspicion, based on specific articulable facts involving more than mere ethnic appearance, that he is an alien (except at the border or its functional equivalent, where you may question anyone);

2. detain, short of arrest, a person (e.g., a pedestrian or employee on the job) if you have a reasonable suspicion that the person is an alien illegally in the United States,

3. arrest an alien if you have probable cause to believe that he is present in or entering the United States illegally and is likely to escape before you can obtain a warrant;

4. arrest a person if you have probable cause to believe that he is guilty of committing a felony relating to the immigration laws which has actually been committed and you believe he is likely to escape before you can obtain a warrant;

5. frisk a person who has not been arrested if you have a reasonable suspicion that he is armed,

6. during a frisk, seize ONLY objects reasonably believed to be weapons;

7. perform a complete search of an arrested person and of the area within his reach and control;

8. search a person who is not under arrest ONLY to the extent necessary to prevent the destruction of evidence and where there is probable cause to search;

9. on roving patrol (or, in the Ninth Circuit, at a temporary checkpoint), stop a vehicle if you have a reasonable suspicion that the vehicle contains an alien illegally in the United States;

10. search the vehicle of a person not arrested if you have probable cause (except at the border or its functional equivalent, where you may search without probable cause);

11. search a house ONLY under RARE EXCEPTIONAL conditions (see p. 27 of M-69);

12. enter private lands within 25 miles of any external boundary of the United States to patrol the border to prevent the illegal entry of aliens into the United States.

I. Sources of Authority

The authority exercised by the employees of the Immigration and Naturalization Service stems from four principal sources. They are: (1) the United States Constitution; (2) statutes enacted by Congress, chiefly the Immigration and Nationality Act of 1952, as amended (INA), 8 U.S.C. 1101 et seq.; (3) published administrative regulations implementing those statutes, 8 C.F.R. 1 et seq.; and (4) interpretations of the Constitution, laws, and regulations by the courts, the Board of Immigration Appeals, and the Service.

The Attorney General is charged by statute with the administration and enforcement of the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens. He is authorized to delegate to employees of the Service or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him by the Act, and he may impose such duties on any employee of the United States, with the consent of the head of the department or agency under whose jurisdiction the employee is serving. 1/ By regulation the Attorney General has delegated administrative enforcement authority to the Commissioner of Immigration and Naturalization. 2/ By regulation the Commissioner in turn has redelegated authority to immigration officers. The term "immigration officer" includes, among others, immigration inspectors, Border Patrol agents, and investigators. 3/ (See Section II. Definitions, below.)

FOOTNOTES

I. Sources of Authority

1/ Section 103, INA.

2/ 28 C.F.R. 0.105 et seq.; 8 C.F.R.2.1.

3/ 8 C.F.R. 103.1(q).

II. Definitions

Arrest: Actual or constructive seizure or detention of the person performed with the intention to take into custody and so understood by the person detained.

Border search: Search made at the border or its functional equivalent. Immigration officers do not need probable cause to make a border search of any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States. They do not need probable cause to search, at the border or functional equivalent, any person seeking admission into the United States if they have reason to suspect that grounds exist for exclusion from the United States which would be disclosed by such search.

Courts of Appeals. The composition of the United States Courts of Appeals is as follows:

First Circuit: Maine, Massachusetts, New Hampshire, Puerto Rico, Rhode Island;

Second Circuit: Connecticut, New York, Vermont;

Third Circuit. Delaware, New Jersey, Pennsylvania, Virgin Islands;

Fourth Circuit: Maryland, North Carolina, South Carolina, Virginia, West Virginia;

Fifth Circuit: Canal Zone, Louisiana, Mississippi, Texas;

Sixth Circuit: Kentucky, Michigan, Ohio, Tennessee;

Seventh Circuit: Illinois, Indiana, Wisconsin;

Eighth Circuit: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota;

Ninth Circuit: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington;

Tenth Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, Wyoming;

Eleventh Circuit: Alabama, Florida, Georgia;

D.C. Circuit: District of Columbia

Degrees of suspicion:

1. Mere suspicion--at the border or its functional equivalent, all that an an immigration officer needs to justify a search and comply with the requirements of the Fourth Amendment. This is supplied by the mere fact that the person is attempting to enter the United States from abroad and may reasonably be required to demonstrate that he and his belongings are entitled to enter the United States.

2. Reasonable suspicion of alienage--the degree of suspicion that an immigration officer must have before he may, pursuant to INS policy guidelines, question a person. (In the Southern District of New York an officer must have a reasonable suspicion that the person is an alien illegally in the United States. See 3. below.) This suspicion must be based on more than ethnic physical appearance, e.g., Mexican or Chinese ancestry. This "reasonable suspicion" must be based on "specific articulable facts"--particular characteristics or circumstances which the officer can, if called upon, describe in words--such as foreign manner of dress or grooming, apparent inability to speak English, officer's knowledge of a high concentration of aliens in the area, or a specific tip from an informant.

3. Reasonable suspicion that person is an alien illegally in the United States--the degree of suspicion that an immigration officer must have before he may, pursuant to INS policy guidelines, detain a person, short of arrest, for further questioning. Where this higher degree of suspicion arises it is generally after initial questioning on the basis of suspicion of alienage alone. It may be based on objective observations, information from police reports if available, consideration of the modes or patterns of operation of certain lawbreakers, the officer's knowledge of a high concentration of illegal aliens in the area or of recent illegal border crossings, a specific tip from an informant, the subject's excessive nervousness or studied nonchalance upon being in the presence of or questioned by an immigration officer, or the subject's admissions, and the inferences and deductions which a trained officer may draw from these factors.

4. Reasonable suspicion that a vehicle contains an alien or aliens who may be in the United States illegally--the degree of suspicion which an immigration officer on roving patrol (or at temporary checkpoints in the Ninth Circuit) must have before he may constitutionally stop a vehicle to question its occupants. This suspicion may be based on factors similar to those described in 3 above as well as on features of the vehicle such as fold-down seats, spare tire compartments where a person could be concealed, a large number of passengers, or an unusually heavy load.

5. Probable cause--the degree of suspicion which an officer must have that an offense within his jurisdiction has been or is being committ before he may constitutionally conduct a search (except at the border or its functional equivalent, or a search of the interior of a vehicle incident to the arrest of an occupant of the vehicle) and before he may make an arrest. An officer has probable cause to arrest or search if the facts and circumstances within his knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief (1) that an offense has been or is being committed by the person to be arrested, or (2) that fruits, instrumentalities, or evidence of an offense will be found on the person or in the place to be searched

Detention not amounting to arrest. Temporary forcible restraint, usually for the purpose of conducting further interrogation.

Exigent circumstances: Those circumstances sufficient to excuse an officer from the requirement of obtaining a warrant to conduct a search for which he has probable cause. Such circumstances include time pressures, the emergency nature of the situation, and the potential danger of the situation which makes obtaining a warrant impossible or ill-advised in light of the urgent need for immediate action.

Frisk: Pat-down of outer clothing of person suspected of being armed, for the purpose of detecting a weapon. This is a limited form of search.

Functional equivalent of the border Point marking the intersection of two or more roads extending from the border without any major intervening crossroad; or an airport in relation to a nonstop flight from abroad.

Interrogation: Formal questioning by immigration officers designed to elicit information concerning immigration status; goes beyond casual conversation.

Miranda warning. Warning given to an individual who is both in custody and suspected or accused of crime that: (1) he has the right to remain silent; (2) anything he may say may be used against him in a subsequent proceeding; (3) he has the right to consult with a lawyer and to have the lawyer with him during interrogation; and (4) if he is indigent, a lawyer will be appointed to represent him.

Questioning: Less intrusive than detention when a pedestrian is involved; requires the cooperation of the person questioned. Lack of cooperation alone does not justify detention for further questioning.

III. General Authority of Immigration Officers Relating to Arrest, Search, and Seizure (subject to limitations and interpretations detailed in succeeding sections)

Immigration officers have statutory authority, without a warrant, to:

A. Search persons and personal effects of applicants for admission, section 287(c), INA;

B. Board and search conveyances in which they believe aliens are being brought into the United States, section 235(a);

C. Enter private lands within 25 miles of the border for purposes of patrolling the border to prevent illegal entry of aliens, section 287(a)(3);

D. Arrest aliens who in the officer's presence or view are entering or attempting to enter the United States in violation of the immigration laws, or are reasonably believed to be in the United States in violation of the immigrat laws, section 287(a)(2);

E. Arrest persons reasonably believed to have committed felonies contra to the immigration laws if there is a likelihood that the person will escape before a warrant can be obtained, section 287(a)(1) (for list of felonies, see V.B.1. below);

F. Seize conveyances, including vessels, vehicles, or aircraft, used to bring in, transport, or conceal aliens not entitled to enter or reside in the United States, section 274(b).

Immigration officers also have statutory authority to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens, section 287(a)(4).

IV. Problem Areas

In the text which follows, further aspects of arrest, search, and seizure will be highlighted. They are generally areas which have recently been clarified by the courts or which need such clarification.

One area involves arrest warrants and search warrants. When are they needed? Under what circumstances are they not needed?

Location and circumstances affect the type of action an immigration officer may take as well as whether or not a search warrant is required and the degree of certainty (e.g., reasonable suspicion based on specific articulable facts, or probable cause) he must have before he may question an individual, detain him short of arrest, arrest him, or search him and/or his vehicle. The locations which make a difference according to current interpretation are: (1) the border or its functional equivalent, (2) permanent checkpoints which are not the functional equivalent of the border, (3) temporary checkpoints, (4) areas covered by roving patrol, (5) private lands and buildings other than dwellings within 25 miles of the border, and (6) dwellings. Concerning permanent checkpoints, roving patrol, and temporary checkpoints, different degrees of suspicion are required depending on whether the officer merely stops the vehicle to question the occupants or whether he searches the vehicle for undocumented aliens. Moreover, suspicion of alienage alone is enough to warrant questioning a person who is on foot regarding his immigration status, while, before an officer on roving patrol (or at a temporary checkpoint in the Ninth Circuit) may stop a vehicle to question its occupants, he must suspect that it contains aliens who are illegally in the United States. The officer also must suspect illegal alienage in the case where he temporarily detains a pedestrian for further questioning about his immigration status.

Other aspects of the law which are highlighted in the pages that follow are warnings (at what point must warnings be given, and must they be Miranda warnings?), the use of force, and the consequences to immigration officers of illegal action on their part.

V. Do's and Don't's--Legal and Policy Requirements

A. Questioning and Detention Not Amounting to Arrest

Immigration officers may interrogate without warrant any alien or person believed to be an alien as to his right to be or remain in the United States. Before questioning an individual, the immigration officer should identify himself as such.

1. Where and under what circumstances?

a. Border and functional equivalent of the border

Travelers may be stopped at the international boundary and required to identify themselves as entitled to enter the United States and to show that their belongings and effects may lawfully be brought in.

Section 235(a) of the INA authorizes the examination by immigration officers of all aliens arriving at ports of the United States and the questioning under oath of any person suspected of being an alien concerning his right to enter, reenter, pass through, or reside in the United States, or any other matter related to enforcement of the Immigration and Nationality Act and concerning his purpose or purposes in coming to the United States.

Such questioning and examination are not limited to ports of entry, but may be performed by immigration officers anywhere along the international borders and at those checkpoints which are the functional equivalent of the border, such as a point marking the intersection of two or more roads extending from the border without major intervening crossroads, or an interior airport after a nonstop flight from abroad. 1/ Not all permanent checkpoints are the functional equivalent of the border.

b. Checkpoints which are not the functional equivalent of the border

Border patrol officers may lawfully stop motorists at a permanent checkpoint which is not the functional equivalent of the border without reason to believe that the particular vehicle is carrying aliens not entitled to enter or be in the United States. 2/ They may even refer motorists to a secondary inspection area for questioning concerning their citizenship and immigration status largely on the basis of apparent foreign ancestry without violating the Fourth Amendment. 3/ However, Border Patrol agents should rely on factors in addition to apparent foreign ancestry when selectively diverting motorists. It is current practice to stop as many cars passing through such checkpoints as possible in order to question the occupants, but a search may not be made unless based on consent, probable cause, or a warrant. 4/ It is Service policy to operate temporary checkpoints in the same manner as permanent checkpoints 4a/ except in the Ninth Circuit, where any temporary checkpoint questioning must be based on articulable facts. 4b/

c. Roving patrol, area control

1) Vehicles

The Supreme Court has held that on roving patrol, when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the United States, he may stop the car briefly and investigate the circumstances that provoked the suspicion. The officer may question the driver and occupants concerning their citizenship and immigration status and may ask for an explanation of the suspicious circumstances, but any further detention or search must be based on consent or probable cause in order to avoid violating the Fourth Amendment to the United States Constitution. 5/ The effect of this rule is that immigration officers on roving patrol may not stop a vehicle unless they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant the suspicion that the vehicle contains aliens illegally in the country. Factors which may be considered include the following.

a) Objective observations, e.g.

(1) characteristics of the area in which the vehicle is found, including proximity to the border and the pattern of traffic in the area;

(2) the driver's or passenger's behavior;

(3) aspects of the vehicle, such as fold-down seats and spare tire compartments where a person could be concealed;

(4) whether the vehicle is heavily loaded or has a large number of passengers;

(5) the characteristics of persons living in a foreign country, such as dress and haircut or inability to speak English;

b) Information from outside sources, e.g.

(1) police reports if available;

(2) information about recent illegal border crossings;

(3) an anonymous tip;

c) Experience and training

(1) previous experience with alien traffic;

(2) inferences and deductions of a trained officer. 6/

The appearance of being of foreign descent without more, is insufficient to justify an investigatory stop. 7/

The same rule has been applied by the Ninth Circuit to stops at temporary checkpoints. 8/ Outside the Ninth Circuit the Service operates temporary checkpoints in the same manner as permanent checkpoints. See V.A.1.b. above.

The Ninth Circuit has further limited the officer's authority to question occupants of properly stopped vehicles to those occupants reasonably believed to be aliens illegally in the United States. 8a/ This ruling must therefore be followed in the Ninth Circuit.

2) Pedestrians

First, an important difference between vehicle stops and pedestrian contacts must be discussed. When a car is stopped on the highway by a roving patrol, the driver and the occupants of the car are, by the mere fact of being stopped, temporarily detained. Such an intrusion on the privacy of the driver and other occupants is not justifiable unless based upon a reasonable suspicion that the vehicle contains aliens illegally in the United States. 9/ However, when a pedestrian is questioned, he may walk away unless restrained by the officer. For this reason there is a distinction in pedestrian cases between questioning on the one hand, and temporary detention on the other. The former has been described as requiring the individual's cooperation, 10/ while the latter involves restraint. This distinction does not exist in vehicle cases.

The law is less settled in cases involving the questioning of pedestrians than it is in cases involving vehicle stops. It is Service policy that if an immigration officer has a reasonable suspicion based on factors similar to those set forth above (in II, Degrees of Suspicion, 2) that a pedestrian or a person at his work site is simply an alien, regardless of the legality of his presence in the United States, he may question that person as to his right to be or remain in the United States.

The Supreme Court specifically did not decide this question in Brignoni-Ponce. The Courts of Appeals for the Seventh and Ninth Circuits and for the District of Columbia Circuit have held that to question a person concerning his right to be in the United States, as distinguished from detaining him, a reasonable suspicion of alienage is all that is required. 11/ It is Service policy to follow this rule nationwide and to work specific complaints and leads, placing emphasis on locating

aliens employed in violation of the INA. 11a/

The Supreme Court has repeatedly held that a person is seized for purposes of the Fourth Amendment only when by means of physical force or a show of authority his freedom of movement is restrained. 11b/ The purpose of the Fourth Amendment is to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals. 11c/ As long as the person to whom questions are put by enforcement officials remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy which would require some justification under the Constitution. 11d/

However, the Ninth Circuit and the District Court for the Northern District of Illinois have held that in a factory survey where officers are stationed at the exits so that the workers within can observe them, the entire workforce within is seized within the meaning of the Fourth Amendment.11e/ Any questioning of persons "seized" in this manner must be based upon a reasonable suspicion that the individual questioned is an alien illegally in the United States. The Solicitor General has authorized further review of both cases. Pending the ultimate resolution of these cases, special guidelines have been developed for operations in these jurisdictions and must be followed by all officers located there. Outside the Ninth Circuit and the Northern District of Illinois, the law and policies stated in the above three paragraphs apply.

d. Private lands, other than dwellings

Section 287(a)(3) of the INA grants to immigration officers access to private lands, but not dwellings, within 25 miles from any external boundary of the United States for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States. "Patrolling the border to prevent the illegal entry of aliens into the United States" as used in that section means conducting such activities as are reasonable and necessary to prevent the illegal entry of aliens into the United States. 12/

Service policy, as expressed in O.I. 287.3, instructs patrol officers to inform the owner or occupant of private lands that they propose to avail themselves of their power of access to those lands. If a direct challenge is made to an officer's authority to carry out duties by a rancher, farmer, or plant operator, etc., the matter should immediately be brought to the attention of the office supervisor. In most cases consent will be given in advance for extended periods; if not, and after all methods of persuasion have failed, including efforts by personal interview and the placing of the landholder on notice of the law by registered mail, officers may gain access to areas within the 25-mile area by the most expeditious means, if ab-

solutely necessary. This is an extreme measure and is to be resorted to only on the direction of a supervisory officer after careful consideration. The fences and gates should be repaired immediately and precautions taken to avoid damage to the property. (Whether and what kind of legal action may be taken against immigration officers who thus or otherwise enter private land is discussed at VI below.)

The authority of section 287(a)(3) may be invoked to obtain entry onto land when such entry is for the purpose of patrolling the border to prevent the illegal entry of aliens. However, when properly on the land, INS officers may question persons found there regardless of whether those persons are believed to be recent illegal entrants into the United States.

Most of the decided cases in which private property has been entered do not involve open lands at the border but rather involve investigations in buildings in urban areas, portions of which are open to the public, such as restaurants, factories, and hospitals. According to INS policy, these buildings are not encompassed by the grant of authority in section 287(a) even if they are located within 25 miles of an external boundary. Although immigration officers do not need permission to enter the public areas of these buildings, it is advisable to request permission to enter. 13/ Moreover, consent or a search warrant is needed to search the nonpublic areas of these establishments, unless there are exceptional circumstances. See V.E.

To question a person encountered in establishments such as restaurants, factories, or hospitals regarding his right to enter or remain in the United States, it is Service policy that an officer must have a reasonable suspicion based on specific articulable facts and rational inferences drawn from those facts that the person is an alien. 14/ (See V.A.1.c.2) above.) However, to detain such a person, it is Service policy that the officer must have a reasonable suspicion that he is an alien illegally in the United States, 15/ (see 3. below) and that lack of cooperation alone does not justify detention for further questioning.

2. Frisk permitted? Other search?

An officer may frisk--i.e. pat down the outer clothing of--a person he has detained for questioning (see V.A.3. below) if he believes that the individual may be armed, in order to guarantee the officer's own safety and that of others. (A frisk is not appropriate where the officer does not have a reasonable suspicion of wrongdoing and where the subject is free to disregard the questions and walk away.) If the officer feels something which may be a weapon, he may reach inside the person's outer clothing to remove it. A limited search of this type may be made without probable cause for arrest

and without the absolute certainty that the person is armed. The officer may also search the area within the subject's reach for the same purpose. Such a search is reasonable within the terms of the Fourth Amendment. 16/ Any weapon seized as a result of such a limited search, and/or any other object seized which feels like a weapon but which turns out not to be one, is admissible into evidence in subsequent proceedings. 17/ A frisk for weapons is justified if made on the basis of a tip from an informant. 18/

A pat-down search conducted as part of a routine border inspection may be conducted on the basis of a "mere suspicion."

Any other search beyond a frisk for weapons which is not made at the border or its functional equivalent must be based on consent, a search warrant, or probable cause. 19/

3. Detention or restraint not amounting to arrest

It is Service policy that temporary forcible detention, not amounting to arrest, is permissible for the purpose of conducting further interrogation of a person who is reasonably suspected of being an alien illegally in the United States. 20/

Detention of this type is not an arrest, but information gleaned from the questioning may provide the basis (i.e., probable cause) for a subsequent arrest.

The Ninth Circuit and the District Court for the Northern District of Illinois have held that in a factory survey where officers are stationed at the exits so that the workers within can observe them, the entire workforce within is detained, i.e., seized, within the meaning of the Fourth Amendment. 20a/ Such a "seizure" is not proper, these courts have held, unless the officers have a reasonable suspicion that all persons so "seized" are aliens illegally in the country. The Solicitor General has authorized further review of both cases. Pending the ultimate resolution of these cases, the special guidelines developed for those jurisdictions must be followed there.

4. Warnings

In these preliminary stages of an investigation, a person who is questioned or who is temporarily forcibly restrained for further questioning but who is not the focus of a criminal investigation and has not been arrested, is not considered to be in custody, and need not be given the Miranda warning. 21/ No other warnings are required until a determination is made to hold the alien in informal proceedings under Section 236 or 242 of the Act or until a warrant of arrest is served. (See p. 19 and p. 21 regarding warnings required in other circumstances.)

5. Seizure and forfeiture of conveyances

Immigration officers have authority to seize for forfeiture any conveyance, including any vessel, vehicle, or aircraft, which is used in the commission of a violation of section 274(a) of the Act, unless the owner can establish that the unlawful act was committed by a person who had illegally acquired possession of the conveyance, or unless the conveyance is being used as a common carrier and it does not appear that the owner or other person in charge of the conveyance was a consenting party or privy to the illegal act. The statute states that any conveyance subject to seizure under this legislation may be seized without a warrant if there is probable cause to believe the conveyance has been used in violation of section 274(a) and circumstances exist where a warrant is not constitutionally required. 22/ INS policy requires that a warrant be obtained prior to seizure of any conveyance, absent exigent circumstances. When probable cause exists to seize a conveyance at the time of initial encounter, the conveyance may be seized without a warrant when there is a likelihood that the conveyance will subsequently be unavailable for the execution of a warrant.

6. Fact situations involving questioning

If an officer questions or temporarily detains an individual pursuant to the authority of section 287(a)(1), he must be prepared to state what the facts and inferences were on which the suspicion leading to the contact was based, as his action may be challenged in administrative or court proceedings. Here are some sample fact situations and the corresponding determinations of the courts.

In one case the immigration officer had the individual's picture and name and information that he was possibly in the United States illegally. The stop was legal. 23/

In one case, the individual was with a known illegal alien, spoke with a distinct Spanish accent, and had trouble speaking English. He also appeared shocked when he found out that he was being questioned by an INS officer. The court held that under these circumstances, the immigration officer's questioning of the individual concerning his name and country of origin was clearly justified. 23a/

When immigration officers went to a restaurant after receiving a tip that illegal aliens were employed there, it was proper to stop and question uniformed kitchen help who were running or attempting to leave the premises. 24/

An immigration officer noticed two men walking across a parking lot in the direction of a shopping center. The two men caught his attention because they were speaking in Chinese, were walking toward a Chinese restaurant, a known employer of illegal aliens, and were dressed in white shirts of the type

normally worn by kitchen help in restaurants. The court held that these factors justified at least a reasonable suspicion that the two men were aliens, and the immigration officer's initial approach for questioning was legitimate. When one of the men became nervous and attempted to walk away from the conversation, the court held that the officer had a right to ask him to stop and to make a direct inquiry about his status in this country. 25/

An anonymous tip can provide the basis for questioning someone. 26/

Questioning was deemed proper when a policeman observed a dark-skinned stranger walking one-and-a-half miles from the Mexican border in an area where illegal entry was common and where the officer knew the area residents. 27/

Stopping and questioning were held proper where an immigration officer saw two Asian men, one dressed in a busboy's uniform, approach a taxi, and where the uniformed one got in while the other one instructed the cab driver where to go (indicating to the officer that the passenger did not speak English) in an area where Asian crewmen who have jumped ship were known to work in food establishments. The case holds that suspicion of alienage was enough, but there were indications of illegal alienage too. 28/

In one case Border Patrol agents observed the tracks of about eight to twenty people, including some distinctive chevron-marked footprints in an area used frequently as a crossing point by illegal aliens entering the U.S. from Mexico. The agents noticed that these tracks were generally visible on weekends after clear nights. The officers deduced when such activity was likely to occur again, where the pick-up point probably would be, at what time it would probably occur, what type of vehicle was likely to be used, and the direction from which it would come and to which it would return. When the officers observed a vehicle which fit the pattern of their deductions, they stopped it. The man in the passenger seat of the camper they stopped wore chevron-soled footwear, and the vehicle was transporting six undocumented aliens. The Supreme Court reversed the Ninth Circuit and praised the Border Patrol for "the kind of police work often suggested by judges and scholars as examples of appropriate and reasonable means of law enforcement." 29/

7. Consequences of illegal detention (See VI.)

V. Do's and Don't's--Legal and Policy Requirements

A. Questioning

1/ Almeida-Sanchez v. U.S., 413 U.S. 266 (1973).

2/ U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976).

3/ Id.

4/ U.S. v. Ortiz, 422 U.S. 891 (1975).

4a/ U.S. v. Gordo-Marin, 497 F.Supp. 432 (S.D. Fla 1980). See also U.S. v. Martinez-Fuerte, supra, at 552.

4b/ U.S. v. Maxwell, 565 F.2d 596 (9th Cir. 1977).

5/ U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975).

6/ Id.; U.S. v. Cortez, _____U.S._____, 101 S.Ct. 690 (1981); U.S. v. Hernandez, 486 F.2d 614 (7th Cir. 1973).

7/ U.S. v. Brignoni-Ponce, supra; U.S. v. Rocha-Lopez, 527 F.2d 176 (9th Cir. 1976)

8/ U.S. v. Maxwell, supra.

8a/ U.S. v. Heredia-Castillo, 616 F.2d 1147 (9th Cir. 1980).

9/ U.S. v. Brignoni-Ponce, supra.

10/ Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977), modifying 540 F.2d 1062 (7th Cir. 1976); Cheung Tin Wong v. U.S., 468 F.2d 1123 (D.C. Cir. 1972); Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971); Illinois Migrant Council v. Pilliod, 531 F.Supp. 1011 (N.D. Ill. 1982).

11/ Id.; ILGWU v. Sureck, 681 F.2d 624 (9th Cir. 1982). Contra, Marquez v. Kiley, 436 F.Supp. 100 (S.D.N.Y. 1977).

11a/ The Third Circuit has held that individualized suspicion was not required where the Service had a tip from a reliable informant regarding the employment of illegal aliens, combined with indicia that the particular employer did employ such aliens. Babula v. INS 665 F.2d 293 (3d Cir. 1981).

11b/ U.S. v. Mendenhall, 446 U.S. 544 (1980); Brown v. Texas, 443 U.S. 47 (1979); Dunaway v. New York, 442 U.S. 200 1979); Terry v. Ohio, 392 U.S. 1 (1967).

11c/ U.S. v. Mendenhall, supra; U.S. v. Martinez-Fuerte, supra at 554.

11d/ U.S. v. Mendenhall, supra. See also Cuevas-Ortega v. INS, 588 F.2d 1274 (9th Cir. 1979).

11e/ ILGWU v. Sureck, supra; Illinois Migrant Council v. Pilliod, 531 F.Supp. 1011 (N.D. Ill. 1982).

12/ 8 C.F.R. 287.1(f)

13/ Matter of Au, Yim & Lam, 13 I&N Dec. 294 (BIA 1969).

14/ Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977), modifying 540 F.2d 1062 (7th Cir. 1976); Yam Sang Kwai v. INS, 411 F.2d 683 (D.C. Cir.) cert, denied, 396 U.S. 877 (1969); Au Yi Lau v. INS, supra. But see Marquez v. Kiley, supra. In the Ninth Circuit and the Northern District of Illinois, special guidelines must be followed. See V.A.1.C.2) above.

15/ Illinois Migrant Council v. Pilliod, supra; Cheung Tin Wong v. U.S., supra; Au Yi Lau v. INS, supra.

16/ Terry v. Ohio, 392 U.S. 1 (1967); Ybarra v. Illinois, 444 U.S. 85 (1979).

17/ See Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, supra; Abel v. U.S., 362 U.S. 217 (1960); U.S. v. Hernandez, supra.

18/ Adams v. Williams, supra.

18a/ U.S. v. Sandler, 644 F.2d 1163 (5th Cir 1981).

19/ U.S. v. Ortiz, supra; Almeida-Sanchez v. U.S., supra.

20/ Illinois Migrant Council v. Pilliod, supra; Cheung Tin Wong v. U.S. supra; Au Yi Lau v. INS, supra.

20a/ ILGWU v. Sureck, supra; Illinois Migrant Council v. Pilliod, 531 F.Supp. 1011 (N.D. Ill. 1982).

21/ Nai Cheng Chen v. INS, 537 F.2d 566 (1st Cir. 1976); Avila-Gallegos v. INS, 525 F.2d 666 (2d Cir. 1975); Chavez-Raya v. INS, 519 F.2d 397 (7th Cir. 1975).

22/ Section 274(b), INA; 8 C.F.R. 274.

23/ Matter of Doo, 13 I&N Dec. 30 (BIA 1968).

23a/ Tejeda-Mata v. U.S., 626 F.2d 721 (9th Cir. 1980).

24/ Matter of Au, Yim, & Lam, 13 I&N Dec. 294 (BIA 1969).

25/ Lee v. INS, 590 F.2d 497 (3rd Cir. 1979).

26/ Ojeda-Vinales v. INS, 523 F.2d 286 (2d Cir. 1975); U.S. v. Hernandez, 486 F.2d 614 (7th Cir. 1973).

27/ U.S. v. Rebon-Delgado, 467 F.2d 11 (9th Cir. 1972).

28/ Cheung Tin Wong v. U.S., supra.

29/ U.S. v. Cortez, ___U.S.___, 101 S.Ct. 690 (1981).

B. Arrest

1. Basis and Purpose

Section 242(a) of the Immigration and Nationality Act provides for the arrest upon warrant of the Attorney General of any alien, pending a determination of his deportability. Section 242(c) authorizes arrest of the respondent at any time within six months after a final order of deportation has been entered. The law strongly favors the use of a warrant. Therefore, warrants are required unless a specific exception to the warrant requirement exists. An officer making a warrantless arrest must be aware of the justification for not first obtaining a warrant.

Section 287(a)(2) of the Act empowers an immigration officer to arrest without warrant any alien who in his presence or view is entering or attempting to enter the United States in violation of any immigration law or regulation, or any alien in the United States, if he has reason to believe that the particular alien is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest.

Section 287(a)(4) gives an officer the authority to execute any warrant or other process issued by an officer under any law regulating the admission, exclusion, or expulsion of aliens.

Section 237.2 of Title 8 of the Code of Federal Regulations provides that the Immigration and Naturalization Service may take an alien into custody at any time to exclude and deport him after he has been finally excluded under section 236 of the INA. Section 243.3 of those regulations states that when an order of deportation becomes final a warrant of deportation shall be issued in the alien's case by the district director. Once the warrant of deportation is issued, if the alien is not in the physical custody of the Service, he shall be given not less than 72 hours notice of time and place to surrender for deportation. If he fails to surrender, as directed, he shall be deported without further notice when located.

Section 287(a)(4) of the Act authorizes an immigration officer to arrest any person without warrant for felonies which have been committed and which are cognizable under the immigration laws if he has reason to believe that the particular person is guilty of a felony and is likely to escape before a warrant can be obtained. Felonies for which an officer may make an arrest under this provision include: (1) bringing in, transporting, harboring, or aiding the entry of aliens who are not entitled to enter or remain in the United States, section 274; (2) illegal entry by an alien for the second or subsequent time, section 275; (3) reentry of an arrested and deported or excluded alien without the advance permission of the Attorney General to reapply for admission, unless he shows that he is exempt from seeking that advance permission, section 276; (4) aiding or conspiring to aid a subversive alien to enter the United States, section 277; and (5) importing or harboring aliens for any immoral purpose, such as prostitution, section 278.

Among other felonies which fall within the jurisdiction of the Service are those described in sections 242(e) and 266(d) of the INA as well as certain ones in Title 18 of the United States Code relating to false personation, nationality and citizenship, and passports and visas. For a more complete and descriptive listing, see I&NS Investigator's Handbook, Appendix 5-5A and 5-5B.

The Act clearly gives immigration officers the dual authority to make arrests either for the purpose of holding an alien for matters relating to civil administrative proceedings--and this includes the possibility of arrest after a final order of deportation or exclusion has been entered--or for the purpose of commencing criminal proceedings, or both.

The Fourth Amendment, in pertinent part, guarantees "the right of the people to be secure in their persons...against unreasonable searches and seizures," and provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing...the persons...to be seized." If a warrant must be based on probable cause, an arrest without a warrant must have no less firm a basis. An arrest, therefore, with or without a warrant, and whether for deportation purposes or for criminal prosecution, must be based on probable cause. 1/

In many cases, the initial contact is not the arrest but questioning based on reasonable suspicion of alienage or of illegal presence in the United States. This questioning may result in answers or behavior or both by the person being questioned which will provide probable cause to make an arrest. 2/

2. When may an arrest be made without a warrant?

A warrantless arrest is permitted by statute only if the immigration officer reasonably believes that the individual is likely to escape before a warrant can be obtained. 3/ Accordingly, an arrest without a warrant is unlawful where the officer has no reason to believe that the suspect is likely to escape. 4/

Evidence of previous escapes or evasions of immigration authorities may provide reason to believe that escape is likely again. 5/ For example, an officer who discovers an alien with an altered resident alien card can make the arrest without a warrant. 5a/ Lack of ties to the community such as family, home, or a job, may indicate the likelihood of escape or unavailability. Present behavior, such as attempted flight from the presence of the immigration officer or nervous behavior suggesting that the suspect is looking for an opportunity to run, may justify an arrest without a warrant. 6/ If the suspect is in an automobile, the mobility of the vehicle may justify the belief that he is likely to escape before a warrant can be obtained. 7/

3. Frisk permitted? Other search?

Prior to arrest an officer may "frisk"--i.e. pat down the outer clothing of--a person he has temporarily detained if he reasonably believes that the individual may be armed, in order to guarantee his own safety and that of others. 8/ If he feels something which may be a weapon, he may reach inside of the person's outer clothing to remove it. A limited search of this type may be made without probable cause for arrest and without the absolute certainty that the person is armed. The officer may also search the area within the subject's reach for the same purpose. Such a "search" is reasonable within the terms of the Fourth Amendment. 8/ Any weapon seized as a result of such a limited search, and/or any other object seized which feels like a weapon but which turns out not to be one, is admissible into evidence in a subsequent proceeding. 9/ A frisk for weapons is justified if made on the basis of a tip from an informant. 10/

This paragraph applies prior to arrest. Once an individual has actually been placed under arrest, a complete search may be made of his person and of the area within his reach and control. Moreover, once a lawful arrest is made, the officer is authorized to accompany the arrested person to his home and has a right to remain literally at his elbow at all times. An officer thus lawfully within a dwelling is in a position to observe what is in plain view and to take appropriate action. 10a/ This, however, is not license to search the area beyond the reach and control of the arrested person.

The Supreme Court has held that, incident to the lawful arrest of an occupant of an automobile, the entire passenger compartment may be searched pursuant to the "immediate reach" doctrine. 10b/ See V.C.2. for search incident to legal arrest.)

4. Arrest procedure

a. Criminal

1) Defendants

The United States Attorney determines, on the basis of all the evidence, whether authority should be granted to file a complaint. If criminal charges are to be brought, the arrested person must be taken before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. 11/ This procedure is separate from and additional to the one that must be followed for exclusion or deportation proceedings. (See b. Civil below.) If a person arrested without a warrant is not taken before a committing magistrate without unnecessary delay, any statement taken during the period of unnecessary delay is inadmissible in court. 12/

2) Material witnesses

Under the Bail Reform Act of 1966, amending 18 U.S.C. 3146-52, 3041, 3141-43, and 3568, a material witness in any criminal proceeding is entitled to the same treatment regarding conditions of release as are defendants accused of noncapital offenses, if it is shown that it may become impracticable to secure his presence by subpoena. He shall be released on personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer before whom he appears unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person required. If the latter determination is made, the judicial officer shall impose the first or any combination of five conditions of release listed in 18 U.S.C. 3146(a).

A person for whom conditions of release are imposed and who after 24 hours from the time of the release hearing continues to be detained because he cannot meet the conditions of release shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them, or, if he is not available, by any other judicial officer in the district. If the person is not thereupon released, the judicial officer shall give the reasons for continued detention in writing.

Section 3149 of 18 U.S.C. provides that no material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice.

The Supreme Court has held that prompt deportation of illegal alien witnesses is justified if the United States Attorney makes a good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. However, sanctions may be imposed on the Government for deporting witnesses if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to the defense in ways not merely cumulative to the testimony of available witnesses. 12a/ This decision has the effect of permitting the Government to continue, in most cases, its practice of charging smugglers and transporters with bringing in or transporting a limited number of aliens and of holding as material witnesses only those aliens with whose transportation the defendant is charged.

b. Civil

The regulations provide that an alien arrested without a warrant under section 287(a)(2) of the Immigration and Nationality Act shall be taken without unnecessary delay before an officer other than the arresting officer and examined concerning his right to enter or remain in the United States. If no other qualified officer is readily available and it would entail unnecessary delay to take the alien before another officer, the arresting officer may examine the alien if the conduct of such an examination is part of the duties assigned to him. This procedure is limited to the context of exclusion and deportation proceedings. The purpose of this procedure is to decide whether there is prima facie evidence of attempted illegal entry or of illegal presence in the United States to warrant holding exclusion or deportation proceedings. 13/ This procedure is separate from and additional to the one that must be followed for criminal prosecutions. (See a. Criminal, 1) Defendants, above.)

5. Warnings

When an alien is served with a warrant of arrest in deportation proceedings, or after an examining officer has determined that formal exclusion or deportation proceedings shall be instituted against an alien who has been arrested without a warrant, the alien shall be advised of the reason for his arrest, of his right to be represented by counsel of his own choice at no expense to the Government, and of the availability of free legal services programs and of organizations recognized pursuant to 8 C.F.R. 292.2 located in the district where the proceedings are to be held. He shall be given a list of such programs. He shall also be advised that any statement he may make may be used against him in subsequent proceeding. 14/ If the alien was arrested without a warrant, he shall be advised that a decision will be made within twenty-four hours as to whether he will be continued in custody or released on bond or personal recognizance. 15/ If only exclusion or deportation proceedings are contemplated, complete Miranda warnings are not required, because deportation and exclusion proceedings are civil, not criminal, in nature. 16/ However, if a criminal prosecution is contemplated, the full Miranda warnings must be given before any questioning once the suspect is in custody. 17/

6. Consequences of illegal arrest (See VI.)

B. Arrest

1/ Deportation cases: Cabral-Avila v. INS, 589 F.2d 957 (9th Cir. 1978), cert. denied, 440 U.S. 920; Min-Shey Hung v. U.S., 617 F.2d 201 (10th Cir. 1980); Avila-Gallegos, v. INS, 525 F.2d 666 (2d Cir. 1975); Ojeda-Vinales v. INS, 523 F.2d 286 (2d Cir. 1975); Cheung Tin Wong v. U.S., 468 F.2d 1123 (D.C. Cir. 1972); Au Yi Lau v. INS, 445 F.2d 217 (D.C.), cert. denied, 404 U.S. 864 (1971); Yam Sang Kwai v. INS, 411 F.2d 683 (D.C. Cir.), cert. denied, 396 U.S. 877 (1969). Criminal cases: U.S. v. Cantu, 519 F.2d 494 (7th Cir.), cert. denied, 423 U.S. 1035 (1975); U.S. v. Rebon-Delgado, 467 F.2d 11 (9th Cir. 1972) (may be police officer rather than immigration officer--same standard); Roa-Rodriquez v. U.S., 410 F.2d 1206 (10th Cir. 1969).

2/ Avila-Gallegos v. INS, supra; Ojeda-Vinales v. INS, supra; U.S. v. Cantu supra; Cheung Tin Wong v. U.S., supra; Au Yi Lau v. INS, supra; Yam Sang Kwai v. INS, supra.

3/ Section 287(a)(2) and (4).

4/ U.S. ex rel. Martinez-Angosto v. Mason, 344 F.2d 673 (2d Cir. 1965).

5/ Yam Sang Kwai v. INS, supra; Hon Keung Kung v. D.D., INS, 356 F.Supp. 571 (E.D. Mo. 1973).

5a/ U.S. v. Reyes-Oropesa, 596 F.2d 399 (9th Cir. 1979).

6/ U.S. v. Garcia, 616 F.2d 210 (5th Cir 1980); United States v. Hernandez-Rojas, 470 F.Supp 122 (E.D.N.Y.), affirmed, 615 F.2d 1351 (2d Cir. 1979); Au Yi Lau v. INS, supra; U.S. v. Meza-Campos, 500 F.2d 33 (9th Cir. 1974).

7/ U.S. v. Hernandez-Rojas, supra; U.S. v. Cantu, supra.

8/ Terry v. Ohio, 392 U.S. 1 (1967); Ybarra v. Illinois, 444 U.S. 85 (1979); U.S. v. Hernandez-Rojas, supra.

9/ See Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, supra; Abel v. U.S., 362 U.S. 217 (1960); U.S v. Hernandez 486 F.2d 614 (7th Cir 1973), cert. denied, 415 U.S. 959 (1974).

10/ Adams v. Williams, supra.

10a Washington v. Chrisman, ___U.S. ___, 102 S. Ct. 812 (1982).

10b/ Belton v. N.Y., 453 U.S. 454 (1981).

11/ 8 C.F.R. 287.1(d).

12/ Federal Rules of Criminal Procedure, Rule 5(a), USCA; Mallory v. U.S., 354 U.S. 449 (1957); United States v. Soto-Lopez, 603 F.2d 789 (9th Cir 1979).

12a/ U.S. v. Valenzuela-Bernal, ___U.S.___, 50 U.S.L.W. 5108 (July 2, 1982)

13/ 8 C.F.R. 287.3; Min-Shey Hung v. U.S., 617 F.2d 201 (10th Cir. 1980). Yiu Fong Cheung v. INS, 418 F.2d 460 (D.C. Cir. 1969).

14/ 8 C.F.R. 287.3 and 242.2(a); Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977).

15/ 8 C.F.R. 287.3.

16/ Nai Cheng Chen v. INS, 537 F.2d 566 (1st Cir 1976); Navia-Duran v. INS, supra; Chavez-Raya v. INS, 519 F.2d 397 (7th Cir. 1975); Avila-Gallegos v. INS, supra.

17/ See Mathis v. U.S., 391 U.S. 1 (1968).

C. Search

1. Frisk and limited search

An officer may frisk--i.e. pat down the outer clothing of--a person he has temporarily detained if he believes that the individual may be armed, in order, to guarantee the officer's own safety and that of others.1/ If the officer feels something which may be a weapon, he may reach inside the person's outer clothing to remove it. A limited search of this type may be made without probable cause for arrest and without the absolute certainty that the person is armed. The officer may also search the area within the subject's reach for the same purpose. Such search is reasonable within the terms of the Fourth Amendment. 1/ Any weapons seized as a result of such a limited search, and/or any other object seized which feels like a weapon but which turns out not to be one, is admissible into evidence at subsequent proceedings. 2/ A frisk for weapons is justified if made on the basis of a tip from an informant. 3/

If no arrest is made but there is probable cause to arrest or to search, officers may, without violating the person's Fourth Amendment rights, temporarily seize a suspect and conduct a search strictly limited to the area within the suspect's immediate reach and control and only to that which is necessary to prevent the destruction of evidence. 4/

2. Search of person incident to legal arrest

a. Basis for search

When a person has been lawfully arrested and is in custody a complete search may be made of his person pursuant to the arrest. Such a search, even though made without a search warrant, does not violate the subject's Fourth Amendment rights. 5/ This type of search may be made regardless of whether or not the officer suspects that the subject may be armed.6/

The purpose of this type of search is two-fold. First, it is performed to protect the officer and others and to insure that the prisoner retains no means for escape, 7/ and second, it is made to prevent the destruction of evidence of the offense for which the subject was arrested. 8/ A search pursuant to an arrest for deportation is analogous to and no more limited than a search pursuant to an arrest for crime, as the need for proof is equally great. 9/

b. Permissible extent of the search

Pursuant to a lawful arrest an officer may, without a search warrant, search the person of the arrestee, 10/ and, at the time of the arrest, the vicinity of the arrest within the reach and control of the

arrestee where he might gain possession of a weapon or piece of evidence. 11/ The officer may seize articles which he sees the arrestee trying to hide. 12/ Even when a lawful arrest is made by an officer as a private person rather than under the authority of the INA, a search incident to the arrest may be made, and the same rules apply. 13/

Strip searches are performed only when probable cause exists to believe that weapons or documentation are being secreted by the arrested person. A strip search is always conducted by an officer of the same sex.13a/

Body cavity searches are performed only where there is specific information that a weapon, documentation, or other contraband is being secreted by the arrestee. When performed, they are always performed by a physician, with an officer of the same sex present.13a/

If the person is arrested inside a house, only that area which is within his reach may ordinarily be searched pursuant to a lawful arrest without a search warrant. 14/ If he is arrested outside or near a house, the house may not constitutionally be searched except in special circumstances, even where there is probable cause to search the house. 15/ Some exceptions are consent, response by the officer to an emergency, 16/ hot pursuit of a fleeing felon 17/ (seldom applies to an alien illegally in the United States), evidence in the process of destruction, 18/ or evidence about to be removed from the jurisdiction. 19/ Another exception, at least in the Fifth Circuit, gives officers the right to conduct a quick and cursory check of a residence after an arrest has been made when they have reasonable grounds to believe that there are other persons present inside the residence who might present a security risk. This is true whether the initial arrest was made inside or outside the residence. 20/ The purpose of this cursory search is to check for persons, not things, and the search is justified only when it is necessary to allow the officers to carry out the arrest without fear of violence. (The Ninth Circuit has stated that such a protective search is not authorized when the officers have gone to a person's residence for purposes of interrogation and where there was no probable cause to arrest the person at the time of the interrogation. 20a/)

c. Warnings

See V.A.4., p. 12, and V.B.5., p. 19 regarding warnings required in connection with questioning, temporary detention not amounting to arrest, and arrest.

Although Miranda warnings must be given to a person who is custody in contemplation of a criminal prosecution prior to interrogati him or taking a statement from him for use in a subsequent criminal prosecution, these warnings need not be given to an arrestee in custody prior to seizing a piece of evidence from him for later use in a trial. Evidence of a noncommunicative nature may be taken from an arrestee in custody without violating his Fifth Amendment privilege against self-incrimination. 21/ However, this is a fine distinction, and unless all communication is unlikely or impossible, as for example, before an interpreter arrives, the safer course is to give the appropriate warnings under 8 C.F.R. 236.2(a), 242.2(a), or 287.3 after a decision has been made to hold the alien in deportation or exclusion proceedings or the Miranda warnings, in cases where criminal prosecution is contemplated.

d. What may be searched for and seized

1) Evidence of the suspected offense

Officers may search for weapons and for instrumentalities, fruits, and evidence of the offense for which the subject was arrested. Such evidence--for example, controlled substances found in the trunk of an automobile--may, of course, be seized. 22/ Persons, as well as objects, may be searched for and seized. 22a/

2) Evidence of other offenses

It is proper to seize evidence of the commission of any crime or offense when it is discovered in the course of a lawful search, even if it is evidence of an offense other than the one for which the person was arrested. 23/

3. Search of vehicle

a. Location

1) Border or functional equivalent of the border

Searches at the border or its functional equivalent must meet the Fourth Amendment requirement of reasonableness. 24/ However, neither a warrant nor probable cause is required to satisfy the constitutional requirement. 25/ It is reasonable on the basis of national self-protection to stop every traveler at an international crossing and to require him to identify himself as a person entitled to admission and his belongings as effects which may lawfully be brought in. 26/

2) Elsewhere (at checkpoints which are not the functional equivalent of the border and on roving patrol)

Border Patrol agents may not lawfully search a vehicle at those permanent checkpoints which are not the functional equivalent of the border without consent, probable cause, or a search warrant, 27/ even though they may stop and question motorists at such checkpoints without reason to believe that the particular vehicle is carrying aliens not entitled to enter or be in the United States. Similarly, any search of vehicles stopped at temporary checkpoints which are not the functional equivalent of the border or by roving patrols must be based on consent freely given, probable cause, or a warrant. 28/

b. Permissible extent of search

1) Search of occupants of vehicle (See C.1. and 2. above)

2) Search of interior and/or trunk of vehicle

At the border or its functional equivalent immigration officers may board and search any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States. 29/ Elsewhere, i.e., at those checkpoints which are not the functional equivalent of the border, and on roving patrol, any search of the vehicle for persons, objects, or substances which are not in plain view must be based on consent freely given, probable cause, or a valid search warrant. Probable cause may be supplied by information from or nervous behavior of the vehicle's occupants; persons, objects, or substances in plain view; or the smell of marijuana. 30/

The Supreme Court has held that where officers have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle and its contents, including all containers and packages, which may conceal the object of the search. 31/ The scope of the search is defined by the object of the search and the places in which there is probable cause to believe it may be found, and not by the nature of the container in which the contraband may be concealed. For example, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.

However, probable cause alone is not sufficient to justify the warrantless search of any movable container that is believed to be carrying contraband when the container is originally found in a public place and subsequently is placed in a vehicle which is not otherwise believed to be carrying contraband. 32/ A warrant must be obtained to search such a container.

The Supreme Court has held that, incident to the lawful arrest of an occupant of an automobile, the entire passenger compartment may be searched pursuant to the "immediate reach" doctrine. 33/

c. Seizure and forfeiture of conveyances

Immigration officers have authority to seize for forfeiture any conveyance, including any vessel, vehicle, or aircraft, which is used in the commission of a violation of section 274(a) of the Act, unless the owner can establish that the unlawful act was committed by a person who had illegally acquired possession of the conveyance or unless the conveyance is being used as a common carrier and it does not appear that the owner or other person in charge of the conveyance was a consenting party or privy to the illegal act. 34/ The statute states that any conveyance subject to seizure under this legislation may be seized without a warrant if there is probable cause to believe the conveyance has been used in violation of section 274(a) and circumstances exist where a warrant is not constitutionally required. INS policy requires that a warrant be obtained prior to seizure, absent exigent circumstances. When probable cause exists to seize a conveyance at the time of initial encounter, the conveyance may be seized without a warrant when there is a likelihood that the conveyance will subsequently be unavailable for the execution of a warrant.

4. Search of residence or business establishment (See V.C. Entering Dwellings or Business Establishments)

C. Search

Terry v. Ohio, 392 U.S. 1 (1967); Ybarra v. Illinois, 444 U.S. 85 (1979).

See Adams v. Williams, 407 U.S. 143 (1972). Terry v. Ohio, supra; Abel v. U.S., 362 U.S. 217 (1960); U.S. v. Hernandez, 486 F.2d 614 (7th Cir 1973).

Adams v. Williams, supra.

Cupp v. Murphy, 412 U.S. 291 (1973).

U.S. v. Robinson, 414 U.S. 218 (1973).

Id.

Abel v. U.S., supra, Chimel v. California, 395 U.S. 752 (1969); Chambers v. Maroney, 399 U.S. 42 (1970).

Chimel v. California, supra; Chambers v. Maroney, supra; Cupp v. Murphy, supra.

Abel v. U.S., supra.

/ U.S. v. Robinson, supra.

/ Vale v. Louisiana, 399 U.S. 30 (1970); U.S. v. Nevarez-Alcantar, 495 F.2d 678 (10th Cir. 1974), cert. denied, 419 U.S. 878 (1974).

/ U.S. v. Alvarado, 321 F.2d 336 (2d Cir. 1963).

/ U.S. v. Viale, 312 F.2d 595, 599 (2d Cir. 1963).

a/ INS Investigator's Handbook, pp. 5-1.5 - 1.6; Border Patrol Handbook, pp. 17-19.

/ Chimel v. California, supra.

/ Vale v. Louisiana, supra.

/ Vale v. Louisiana, supra; U.S. v. Jeffers, 342 U.S. 48, 51 (1951); McDonald v. U.S., 335 U.S. 451, 456 (1948).

/ Vale v. Louisiana supra; Warden v. Hayden, 387 U.S. 294, 298-99 (1966); Johnson v. U.S., 333 U.S. 10, 15 (1948).

18/ Vale v. Louisiana, supra; Schmerber v. California, 384 U.S. 757, 770-71 (1966); U.S. v. Jeffers, supra; McDonald v. U.S., supra.

19/ Vale v. Louisiana, supra; Chapman v. U.S., 365 U.S. 610 (1961); Johnson v. U.S., supra; U.S. v. Jeffers, supra.

20/ McGeehan v. Wainwright, 526 F.2d 397 (5th Cir. 1976); U.S. v. Smith, 515 F.2d 1028 (5th Cir. 1975).

20a/ U.S. v. Wellins, 654 F.2d 550 (9th Cir. 1981).

21/ Cassady v. U.S., 410 F.2d 379 (5th Cir. 1969); Schmerber v. California, supra; Gilbert v. California, 388 U.S. 263 (1967); Brent v. White, 398 F.2d 503 (5th Cir. 1968), cert. denied, 393 U.S. 1123 (1969); U.S. v. Guido, 251 F.2d 1 (7th Cir. 1958), cert. denied, 356 U.S. 950 (1958).

22/ Abel v. U.S., 362 U.S. 217 (1960).

22a/ Federal Rules of Criminal Procedure, Rule 41; Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211 (D.C. Cir. 1981); cert. denied ___U.S.___, 102 S. Ct. 1432 (1982).

23/ U.S. v. Robinson, 414 U.S. 218 (1973); Abel v. U.S., supra; U.S. v. Nevarez-Alcantar, 495 F.2d 670 (10th Cir.), cert. denied, 419 U.S. 878 (1974); U.S. v. Alvarado, 321 F.2d 336 (2d Cir 1963).

24/ U.S. v. McDaniel, 463 F.2d 129, 132 (5th Cir 1972), cert. denied, 413 U.S. 919 (1973); Morales v. U.S., 378 F.2d 187, 189 (5th Cir. 1967); Thomas v. U.S., 372 F.2d 252, 254 (5th Cir. 1967).

25/ Almeida-Sanchez v. U.S., 413 U.S. 266, 272 (1973).

26/ Carroll v. U.S., 267 U.S. 132, 154 (1925); Boyd v. U.S., 116 U.S. 616 (1885); U.S. v. McDaniel, supra.

27/ U.S. v. Ortiz, 442 U.S. 891 (1975).

28/ U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975); U.S. v. Maxwell, 565 F.2d 296 (9th Cir. 1977).

29/ Section 235(a), INA.

30/ U.S. v. Woody, 567 F.2d 1353 (5th Cir. 1978); U.S. v. Sperow, 551 F.2d 808 (10th Cir. 1977); U.S. v. Cantu, 504 F.2d 387 (5th Cir. 1974). But see U.S. v. Perez, 644 F.2d 1299 (9th Cir. 1981).

31/ U.S. v. Ross, ___U.S.___(June 1, 1982).

32/ Arkansas v. Sanders, 442 U.S. 753 (1979); U.S. v. Chadwick, 433 U.S. 1 (1977).

33/ Belton v. N.Y., 453 U.S. 454 (1981).

34/ Section 274(b), INA; 8 C.F.R. 274.

D. Entering Private Lands Within 25 Miles of Any External Boundary of the United States for the Purpose of Patrolling the Border to Prevent Illegal Entry of Aliens

1. Basis for action

The second clause of section 287(a)(3) of the Immigration and Nationality Act gives immigration officers access, without warrant, to private lands but not dwellings, within 25 miles from any external boundary of the United States, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States. Section 287.1(C) of 8 C.F.R. defines "patrolling the border to prevent the illegal entry of aliens" to mean conducting such activities as are reasonable and necessary to prevent the illegal entry of aliens into the United States.

Patrol officers are instructed to "inform the owner or occupant of private lands that they propose to avail themselves of their power of access to those lands. If a direct challenge is made of an officer's authority to carry out duties by a rancher, farmer or plant operator, etc., the matter should immediately be brought to the attention of the office supervisor. In most cases consent will be given in advance for extended periods; if not, and after all methods of persuasion have failed, including efforts by personal interview and the placing of the landholder on notice of the law by registered mail, officers may gain access to areas within the 25-mile area by the most expeditious means, if absolutely necessary. This is an extreme measure and is to be resorted to only on the direction of a supervisory officer after careful consideration. The fences and gates should be repaired immediately and precautions taken to avoid damage to the property." 1/

The authority of section 287(a)(3) may be invoked to obtain entry onto land when such entry is for the purpose of patrolling the border to prevent the illegal entry of aliens.

Most of the decided cases in which private property has been entered do not involve open lands at the border but rather involve investigations in buildings in urban areas, portions of which are open to the public, such as restaurants, factories, and hospitals. According to INS policy, these buildings are not encompassed by the grant of authority in section 287(a)(3) even if they are located within 25 miles of an external boundary. Although immigration officers do not need permission to enter the public areas of these buildings, it is advisable to request permission to enter. Moreover, consent or a search warrant is needed to search the non-public areas of these establishments, unless there are exceptional circumstances. See V.E.

2. When, if ever, is trespass justifiable?

From time to time an immigration or police officer is said to have trespassed on private property, and it is alleged that a search or seizure made under those circumstances is unlawful.

The lawfulness of the search or seizure depends on whether or ot it is reasonable under the Fourth Amendment to the Constitution, i.e , hether or not a warrant is required, and, if so, whether the warrant is alid and a proper search is made pursuant to the warrant.

Regarding any alleged trespass, the courts have held either that t is not a trespass at all if the officer enters private property in the erformance of his duty and acts within the scope of his authority, 2/ or hat, if the officer is engaged in the performance of his duty, trespass is ustifiable and therefore of no consequence. 3/

Within twenty-five miles of any external boundary of the United tates, entry onto private lands, but not dwellings, is specifically uthorized by statute. 4/ An entry under these circumstances would not be trespass.

Beyond 25 miles from any external boundary, entry onto private ands by immigration officers is not specifically authorized by statute. here is, however, considerable case law holding that the Fourth Amendment oes not apply to entry onto so-called "open fields" by a law enforcement fficer in the performance of his official duties. 5/ The term "open ields" has been construed as applicable to private lands, not including wellings, which are beyond the curtilage (an area of domestic use immediately urrounding a dwelling and usually, but not always, fenced in with the dwelling), ven if these lands are not observable from outside the owner's land.5a/

The protection which the law affords an officer is predicated pon the assumption that he is acting strictly within the scope of his mployment, is engaged in the performance of his official duties, and has dentified himself as an immigration officer to the person in charge of the ocation. The following are some instances in which an immigration officer ould be considered to be acting within the scope of his authority by ntering onto private lands more than 25 miles from any external boundary. 1) his purpose is to serve a warrant of arrest or of deportation on an lien who he has reason to believe is there; (2) he has definite information hat an alien in the country in violation of law is on the land and is likely o abscond before an arrest warrant can be obtained, or (3) the location is ne which is notorious for the presence of aliens who are in the United States n violation of law.

The Supreme Court has ruled that law enforcement officers may nter upon private property to make warrantless arrests, provided the arrest s based on probable cause and the person is in plain view. 6/ Moreover, a uspect may not defeat an otherwise proper arrest by retreating to a "private lace." 6/ Interference with a federal officer's attempt to make such an rrest can result in a felony conviction under 18 U.S.C. 111 or section 274(a) of the Act or both. 7/

Officers questioning persons in any location except the functional equivalent of the border must adhere to Service policy as set forth on page 9 of this Manual concerning the questioning of pedestrians. If a direct challenge to the officer's authority for being on the land is made by the person in charge at the location, the matter should immediately be brought to the attention of the officer's supervisor.

D. Entering Private Lands Within 25 Miles of Any External Boundary of the United States for the Purpose of Patrolling the Border to Prevent Illegal Entry of Aliens

1/ O.I. 287.3.

2/ Schindelar v. Michaud, 411 F.2d 80 (10th Cir.), cert. denied, 396 U.S. 956 (1969). See also Walker v. Georgia, 417 F.2d 1 (5th Cir. 1969).

3/ U.S. v. Oliver, 686 F.2d 356 (6th Cir. 1982); U.S. v. Knight, 451 F.2d 275 (5th Cir. 1971); Taylor v. Fine, 115 F.Supp. 60 (S.D. Cal. 1953). See also Giacona v. U.S., 257 F.2d 450 (5th Cir. 1958), cert. denied, 358 U.S. 873 (1958).

4/ Section 287(a)(3), INA.

5/ Hester v. U.S., 265 U.S. 57 (1924); U.S. v. Oliver, supra; U.S. v. Williams, 581 F.2d 451 (5th Cir. 1978); U.S. v. Dasile, 569 F.2d 1053 (9th Cir. 1978); U.S. ex rel. Saiken v. Bensinger, 546 F.2d 1292 (7th Cir. 1976), cert. denied, 431 U.S. 930 (1977); U.S. v. Diaz-Segovia, 457 F.Supp. 260 (D. Md. 1978).

5a/ U.S. v. Oliver, supra.

6/ U.S. v. Santana, 427 U.S. 38 (1976).

7/ U.S. v. Varkonyi, 645 F.2d 453 (5th Cir. 1981).

E. Entering Dwellings or Business Establishments

1. Basis for warrantless search

Only under very special circumstances is the search without a search warrant of a house (or apartment, hotel room, business office) justifiable and hence not a violation of the Fourth Amendment, which guarantees the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. This is a most precious right, and the general requirement that a search warrant be obtained is not lightly to be dispensed with. 1/

When a person is lawfully arrested just outside his house and there is probable cause to search the house, the house may not constitutionally be searched without a search warrant unless there is special justification. 2/ (See V.E.3 below.) Even when a person is arrested inside his house, a complete search of the house may not constitutionally be made without a search warrant. Generally, only the arrested person himself and the area within his reach and immediate control may be searched: (1) to prevent the arrested person's escape, (2) to protect the arresting officer and others against the possible use of weapons, or (3) to prevent the concealment or destruction of evidence. 3/ " There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs--or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The 'adherence to judicial processes' mandated by the Fourth Amendment requires no less." 4/

Probable cause to arrest alone or even possession of an administrative arrest warrant is not sufficient, absent exigent circumstances, to justify an officer's entering a dwelling without consent in order to effect an arrest. 4a/

2. Consent

A search warrant is not required, however, nor is probable cause, if a person legally entitled to do so consents to the search. In this regard, a hotel clerk or manager may not effectively consent to the search of a hotel guest's room until the guest has checked out and abandoned possession of the room, 5/ nor will a landlord's consent to a search of his tenant's rented house make such a warrantless search constitutional. 6/ While employers may consent to a search of work areas, they may not consent to the search of occupied dormitories or cottages which they may provide for their workers. 7/ However, a party with common authority over the premises may effectively consent to a search, as where a woman who shared a bedroom with the arrested party consented to a search of their bedroom and of the rest of the house where they lived with the woman's parents and child. 8/

Consent to a search must be voluntary, and the burden is on the Government to prove that consent was freely and voluntarily given. For this purpose the officer should ask the person whose consent is requested

to sign the Form I-214-S, Consent to Search Premises. If the person denies consent, or if he consents to the search orally but refuses to sign the form, that should be noted by the officer on the form.

There is no requirement that the person whose consent for the search is requested be advised of his right to refuse to allow the search without a warrant. As long as it is not coerced by threats or force, or granted only in submission to a claim of lawful authority, his consent is valid, and the resulting search is reasonable. 9/

A search must be strictly tied to and justified by the circumstances which rendered its initiation permissible. 10/

3. Probable cause alone in exceptional circumstances

The search of a house, therefore, is justified by a search warrant or the consent of a person entitled to consent, or, in exceptional circumstances such as the following, by probable cause alone: (1) the officers are responding to an emergency, 11/ (2) they are in hot pursuit of a person fleeing from an arrest which had been set in motion in a public place (search is that reasonably necessary to prevent dangers that the subject at large in the house may resist or escape), 12/ (3) evidence is in the process of being destroyed, 13/ (4) evidence is about to be removed from the jurisdiction. 14/

Another exception, at least in the Fifth Circuit, gives officers the right to conduct a quick and cursory check of a residence after an arrest has been made, when they have reasonable grounds to believe that there are other persons present inside the residence who might present a security risk. This is true whether the initial arrest was made inside or outside the residence. 15/ The purpose of this cursory search is to check for persons, not things, and the search is only justified when it is necessary to allow the officers to carry out the arrest without fear of violence. The Ninth Circuit has stated that such a protective search is not authorized when the officers have gone to a person's residence for purposes of interrogation and where there was no probable cause to arrest the person at the time of the interrogation. 15a/

4. Warrants

It is Service policy that even if an officer has an administrative arrest warrant, if consent to enter a dwelling is denied him, he will not force an entry in order to execute the arrest warrant. 16/

When a Service officer has reason to search a dwelling, a curtilage area (an area of domestic use immediately surrounding a dwelling and usually, but not always, fenced in with the dwelling), or the nonpublic areas of a commercial building, he should, in the absence of consent, seek an appropriate search warrant based on probable cause to believe that a violator or evidence of the violation of the civil or criminal provisions of the immigration laws is on the premises. 17/

Where officers believe that evidence of crimes such as smuggling, aud, or harboring will be found, criminal search warrants should be obtained rsuant to Rule 41, Federal Rules of Criminal Procedure. 17/ Where the imary purpose of the search is to locate aliens who will be held in portation proceedings, a civil order or warrant to search the premises r illegal aliens should be obtained. 17/

Officers executing a search warrant may frisk a person not med in the warrant who is present at the scene of the execution of the rrant and has not been arrested only if they have a reasonable belief at the person is armed and presently dangerous. They may conduct a full arch of such person only if they have probable cause to believe that he in possession of the items for which they are searching pursuant to the rrant. 17a/

5. What may be searched for and/or seized

Officers may search only for those items particularly described n their search warrant or, in the case of a warrantless search, for weapons d for instrumentalities, fruits, and evidence of the offense for which e entry under exigent circumstances or arrest or search with consent was ade. They may seize those items, 18/ and evidence of the commission of ny other crime or offense, when it is discovered in the course of a lawful earch. 19/ Searches for persons as well as for property are permitted. 20/

E. Entering Dwelling or Business Establishments

1/ Chimel v. California, 395 U.S. 752 (1969).

2/ Vale v. Louisiana, 399 U.S. 30 (1970).

3/ Chimel v. California, supra.

4/ Id. at 762-63.

4a/ See Payton v. New York, 445 U.S. 573 (1980), where forcible entry was held invalid without arrest or search warrant where "routine" felony was suspected.

5/ Stoner v. California, 376 U.S. 483 (1964); Abel v. U.S., 362 U.S. 217 (1960).

6/ Chapman v. U.S., 356 U.S. 610 (1961).

7/ Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977), modifying 540 F.2d 1062 (7th Cir. 1976). See Smith v. Lubbers, 398 F.Supp. 777 (W.D. Mich. 1975).

8/ U.S. v. Matlock, 415 U.S. 164 (1974).

9/ Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

10/ Chimel v. California, supra; Terry v. Ohio, 392 U.S. 1 (1968).

11/ Vale v. Louisiana, 399 U.S. 30, 33 (1970); U.S. v. Jeffers, 342 U.S. 48, 51 (1951); McDonald v. U.S., 335 U.S. 451, 456 (1948).

12/ U.S. v. Santana, 427 U.S. 38 (1976); U.S. v. Varkonyi, 645 F.2d 453 (5th Cir. 1981). Cf.; Vale v. Louisiana, supra; Warden v. Hayden, 387 U.S. 294, 298-99 (1966); Johnson v. U.S., 333 U.S. 10, 15 (1948).

13/ Vale v. Louisiana, supra; Schmerber v. California, 384 U.S. 757, 770-71 (1966); U.S. v. Jeffers, supra; McDonald v. U.S., supra.

Vale v. Louisiana, supra, Chapman v. U.S. 365 U.S. 610 (1961); Johnson v. U.S., supra; U.S. v. Jeffers, supra.

McGeehan v. Wainwright, 526 F.2d 397 (5th Cir. 1976); U.S. v. Smith, 515 F.2d 1028 (5th Cir. 1975).

U.S. v. Wellins, 654 F.2d 550 (9th Cir. 1981).

INS Investigators Handbook, S-1.10 (October 1980).

Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211 (D.C. Cir. 1981); cert. denied, __U.S. __, 102 S.Ct. 1432 (1982).

Ybarra v. Illinois, 444 U.S. 85 (1979).

Abel v. U.S., supra; Adams v. Williams, 407 U.S. 143 (1972).

Abel v. U.S., supra; U.S. v. Robinson, 414 U.S. 218 (1973); U.S. v. Nevarez-Alcantar, 495 F.2d 678 (10th Cir.) cert. denied, 419 U.S. 878 (1974); U.S. v. Alvarado, 321 F.2d 336 (2d Cir. 1963).

Blackie's House of Beef, Inc. v. Castillo, supra.

P. Use of Force

It is Service policy that deadly force may not be used except in self-defense, in defense of another officer, or in the defense of an innocent third party when death or grievous bodily harm is threatened. Firearms shall not be used to fire into the air or alongside an individual who is attempting to escape. 1/ Strict adherance to the Service's firearms policy is required concerning any use of a firearm.

The use of physical force or violence in handling detained aliens or other persons with whom official business is being conducted is permissible only in self-defense, in defense of another person, or to such an extent as is absolutely necessary in making an arrest or preventing an escape. The use of physical or psychological abuse to obtain information or to force confessions will not be tolerated. There are times when arrested persons must be handcuffed, but in such cases they should not be exposed to the public view any more than necessary. Every effort should be made to spare an individual unnecessary embarrassment in his relations with the Service. 2/

Use of Force

estigator's Handbook, 1-3.8; Border Patrol
book, 17-4.2, 24-22.

estigator's Handbook, 1-3.9-3.10; Border Patrol
book, 3-9, 17-9, -10, -11.

VI. Improper Actions and Their Consequences

A. Improper Search or Seizure and Related Offenses (not an all-inclusive list)

1. Unreasonable seizures

The following actions by immigration officers constitute violations of Service policy and of court orders in some jurisdictions. Subparagraphs c, d, and e constitute unreasonable seizures and therefore are violations of the Fourth Amendment, which guarantees the people's security against unreasonable searches and seizures:

a. Except at the border or its functional equivalent or at checkpoints, to question a person concerning his right to enter or be in the United States on less than a reasonable suspicion, based on specific articulable facts involving more than mere ethnic appearance, that he is an alien.1/

b. To detain, i.e., temporarily forcibly restrain, a person (such as a pedestrian, an employee on the job), on less than a reasonable suspicion, based on specific articulable facts and reasonable inferences drawn from those facts, that the individual is an alien illegally in the United States. 1/

c. On roving patrol, to stop a car--which amounts to temporary forcible restraint or detention--on less than a reasonable suspicion, based on specific articulable facts and reasonable inferences of a trained officer on the basis of those facts, that the car contains aliens illegally in the United States. 2/

d. To arrest a person on less than probable cause to believe that he is present in or entering the United States illegally or that he has committed a crime.

e. During a frisk to seize an object not reasonably believed to be a weapon. 3/

2. Unreasonable searches

The following actions undertaken by immigration officers without a search warrant, unless freely and voluntarily consented to by a person entitled to consent, constitute unreasonable searches, thereby violating the Fourth Amendment to the U.S. Constitution, and anything seized in the course of an unreasonable search has been unreasonably seized, also in violation of the Fourth Amendment.

a. To make a search incident to an unlawful temporary detention, or unlawful arrest. 4/

b. To frisk a person without a reasonable suspicion that he may be armed 5/, except as part of a routine border search. 6/

c. To search a person who is not under arrest--although there is probable cause to arrest and/or to search--beyond what is necessary to prevent the destruction of evidence. 7/

d. Except at the border or its functional equivalent, to search without probable cause the car of a person not arrested. 8/

e. To search a house unless:

1) a person is arrested while inside the house, and then only that area of the room in which the arrest takes place which is within the reach and immediate control of the arrestee may generally be searched (see V.C.2.b. above);

2) the officer is responding to an emergency;

3) the officer is in hot pursuit of a person fleeing from an arrest which had been set in motion in a public place (search is that reasonably necessary to prevent escape and danger to the officers);

4) evidence is in the process of being destroyed; or

5) evidence is about to be removed from the jurisdiction.

Officers may not enter a private residence to make a routine felony arrest without a search warrant or a criminal arrest warrant, absent exigent circumstances. 8a/ It is Service policy that officers may not enter a residence without consent or a search warrant simply on the strength of an administrative warrant of arrest for a deportable offense.

3. Trespass

The fact that an immigration officer may have trespassed on ate property in the course of making a search or seizure does not ssarily render that search or seizure unreasonable for purposes of Fourth Amendment. For example, open fields are not protected by the th Amendment 9/, and generally something which is in plain view is not idered to be the subject of a search.

4. False arrest, false imprisonment, assault, battery, or violation of constitutional rights by an immigration officer

Aside from the constitutional question concerning the reasonableness search or seizure, false arrest, false imprisonment, assault, battery, violation of a person's constitutional rights by an immigration officer form the basis for a civil tort action against the U.S. Government or against the officer involved. 10/

VI. Improper Actions and Their Consequences

A. Improper Search or Seizure and Related Offenses

1/ Cheung Tin Wong v. INS, 468 F.2d 1123 (D.C. Cir. 1972); Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971); Illinois Migrant Council v. Pilliod, 548 F.2d 715 (7th Cir. 1977), modifying 540 F.2d 1062 (7th Cir. 1976); Illinois Migrant Council v. Pilliod, 531 F.Supp. 1011 (N.D. Ill. 1982); Marquez v. Kiley, 436 F.Supp. 100 (S.D.N.Y. 1977).

2/ U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975); U.S. v. Cortez, ___ U.S. ___, 101 S.Ct. 690, (1981).

3/ Terry v. Ohio, 392 U.S. 1 (1968).

4/ Miller v. U.S., 357 U.S. 301 (1958); U.S. v. Di Re, 332 U.S. 581 (1948).

5/ Terry v. Ohio, supra.

6/ U.S. v. Sandler, 644 F.2d 1163 (5th Cir. 1981).

7/ Cupp v. Murphy, 412 U.S. 291 (1973).

8/ Almeida-Sanchez v. U.S., 413 U.S. 266 (1973); U.S. v. Ortiz, 422 U.S. 891 (1975); U.S. v. Woody, 567 F.2d 1353 (5th Cir. 1978); U.S. v. Sperow, 551 F.2d 808 (10th Cir. 1977); U.S. v . Cantu, 504 F.2d 387 (5th Cir. 1974).

8a/ Payton v. New York, 445 U.S. 573 (1980); U.S. v. Santana, 427 U.S. 38 (1976); U.S. v. Varkonyi, 645 F.2d 453 (5th Cir. 1981).

9/ Hester v. U.S., 265 U.S. 57 (1924); U.S. v. Oliver, 686 F.2d 356 (6th Cir. 1982). See Katz v. U.S., 389 U.S. 347 (1967).

10/ 28 U.S.C.A. 1346(b) (1976); 28 U.S.C.A. 2680(h) (Supp. 1978); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), on remand 456 F.2d 1339 (2d Cir. 1972); Rodriguez v. Ritchey, 539 F.2d 394 (5th Cir. 1976); Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974).

Possible Consequences of Improper Actions by Immigration Officers

1. Exclusion of evidence

a. Criminal prosecutions

The U.S. Constitution guarantees the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Any evidence secured through an unreasonable search or seizure may be barred from use in federal prosecutions, 1/ and in state prosecutions. 2/ The Fourth Amendment guarantees the people's right to privacy, and the exclusionary rule has been fashioned by the courts to guarantee that right. Its purpose is to deter overzealous law enforcement officers from invading the right to privacy by prohibiting the use of the fruits of such an invasion in court. Indeed, convictions based on unlawful searches and seizures are regularly reversed on the basis of the exclusionary rule. 3/ (However, in the Fifth and Eleventh Circuits it has been held that if the officer can establish that his mistaken or unauthorized conduct was taken in a reasonable, good faith belief that it was proper, the court shall not exclude the evidence so obtained. 3a/)

The exclusionary rule applies to evidence obtained in violation of other constitutional and statutory rights as well, e.g., the Sixth Amendment right to counsel, the Fifth Amendment privilege against self-incrimination, the Fifth and Fourteenth Amendment rights to due process of law, and the requirement of prompt arraignment under Rule 5(a) of the Federal Rules of Criminal Procedure. 4/

b. Civil cases, such as deportation

The Department of Justice has made a policy determination to argue that evidence discovered during an unconstitutional search, although inadmissible in criminal proceedings, is admissible in civil proceedings, including deportation proceedings, and the Board of Immigration Appeals has specifically held that unconstitutionally seized evidence is admissible in deportation proceedings. 4a/ Although the Department is taking this position in litigation, however, it in no way condones illegal searches. On the contrary, officers who conduct unconstitutional searches may still be subject to criminal prosecution, civil suit, and disciplinary action. If there is any doubt as to the legality or propriety of a proposed plan of action, the safest course to follow is to obtain advance instructions from the district director or the regional office by telephone or by wire where prompt action is imperative.

Only the Court of Appeals for the First Circuit has decided the question as to whether the exclusionary rule is applicable to deportation proceedings as well as to criminal prosecutions. It held that illegally seized evidence is inadmissible in deportation proceedings. 5/

c. Effect on validity of proceedings

If it is determined that a search or seizure has been made in violation of the law or Constitution, that fact alone will not necessarily invalidate the proceedings from which the evidence may be excluded. If there is untainted evidence—not illegally seized and not derived from an illegal search or seizure—upon which to base a conviction or order of deportation, the proceedings are valid and need not be terminated. 6/

2. Civil damages

a. Personal liability of federal agents

The Supreme Court has held that violation of the Fourth Amendment by a federal agent acting under color of his authority gives rise to a cause of action for damages based on his unconstitutional conduct. 7/

Federal officials exercising discretion generally are entitled to absolute immunity only in those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of public business. 8/ Other federal agency officials entitled to absolute immunity are: (1) hearing examiners or administrative judges when they are performing judicial acts, (2) agency officials who perform functions analogous to those of a prosecutor for their parts in the decision to initiate or continue a proceeding subject to agency adjudication, and (3) agency attorneys presenting evidence at agency hearings. 9/ Otherwise, federal executive officials exercising discretion are entitled only to qualified immunity for those actions taken within the outer perimeter of their duty and without willful or knowing violation of an established constitutional rule. 10/

A federal police officer while in the act of pursuing suspected violators of criminal statutes has no immunity to protect him from damage suits charging violations of the plaintiff's constitutional rights. 11/ However, if an officer alleges and proves that he acted in the manner complained of in good faith and with a reasonable belief that the actions taken were proper and that it was necessary to carry them out in the manner employed, he has a valid defense to a damage action. 12/ Border Patrol agents successfully defended against a damage suit for violating plaintiff's Fourth Amendment rights by proving that they had acted in good faith under then existing law. 13/

b. Liability of the United States to suits for damages

Since March 16, 1974, when 28 U.S.C.A. 2680(h) was amended, the United States has been amenable to civil actions on claims of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution because of acts or omissions of investigative or law enforcement personnel acting within the scope of their office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 14/ The actions complained of must have occurred after March 16, 1974, the effective date of the amendment, to come within its terms. 15/ If a plaintiff wins a judgment against the United States because of the torts of its investigative or law enforcement officers, subsequent suits against the officers individually for the alleged illegal actions are barred by 28 U.S.C.A. 2676 of the Federal Tort Claims Act. Judgment against an individual officer, however, does not preclude later action against the United States, but double recovery is not permissible. 16/

If the actions of the officer are outside the scope of his employment, there is no waiver of sovereign immunity, as for example, in a case involving a fatal shooting by an off-duty officer. 17/ In such a case the United States could not be sued.

3. Criminal prosecution

An immigration officer who acts improperly in performance of his duty may risk prosecution for violation of state or federal laws for crimes including, but not limited to, criminal trespass, breaking and entering, harassment, assault and battery, kidnapping, homicide, maliciously procuring a search warrant, exceeding authority in executing a search warrant, searching a dwelling without a search warrant, maliciously and without reasonable cause searching any other building or property without a search warrant, and depriving an inhabitant of the United States of his constitutional or other legal rights, privileges, or immunities under color of law. 18/

4. Disciplinary action

For any of the improper actions discussed above, whether or not any civil or criminal proceedings are commenced against the officer, he may be subject to agency disciplinary action with possible penalties ranging from an official letter of reprimand to removal from his job, which may bar him from future federal employment. 19/

5. Protection of rights of officers in proceedings

a. Representation by Department of Justice attorneys or private counsel at Department expense

A federal employee who is sued or subpoenaed in his individual capacity in civil or congressional proceedings or who is subject to a state criminal prosecution may be represented by Department of Justice attorneys upon the recommendation of his employing agency if (1) his actions reasonably appeared to have been performed within the scope of his employment with the federal government; (2) he is not the target of a federal criminal investigation or prosecution on the same subject matter; and (3) it is determined by the Department to be in the interest of the United States to provide representation. 20/ If the employee is the target of an investigation concerning the act or acts for which he seeks representation, but no decision to seek an indictment or issue an information has been made, a private attorney may be provided to the employee with Department approval and at federal expense, but federal payments to private counsel will cease if the Department of Justice decides to seek an indictment or issue an information. Private counsel may also be provided if there are conflicts in the positions of several employees in the same case. 21/ Representation at Government expense will not be provided to any employee in connection with any federal criminal matter involving the employee.

If an officer is sued in his individual capacity and wishes to be represented by a Department of Justice Attorney, he should make his request in writing through his Chief Legal Officer and answer the following questions:

1) Where you personally served?

2) If so, what were the time, place, and manner of service?

3) If not, was anyone authorized by you to accept service served?

4) Do you in good faith believe that you were acting within the scope of your employment?

5) If so, what is the basis for your belief?

The officer should also provide answers to the allegations in the complaint which relate to him and indicate what he actually did with regard to the actions complained of.

b. Removal to federal court

Under 28 U.S.C. 1442, if an immigration officer is sued or prosecuted for any act under color of his office or on account of any right, title, or authority claimed under any Act of Congress for the apprehension or punishment of criminals, he may remove the action to the United States district court for the district and division embracing the place where the action is pending.

B. Possible Consequences of Improper Actions by Immigration Officers

1/ Elkins v. U.S., 364 U.S. 206 (1960); Weeks v. U.S., 232 U.S. 383 (1914).

2/ Mapp v. Ohio, 367 U.S. 643 (1961); Rea v. U.S. 350 U.S. 214 (1956).

3/ U.S. v. Ortiz, 422 U.S. 891 (1975); U.S. v. Brignoni-Ponce, 442 U.S. 873 (1975); Almeida-Sanchez v. U.S., 413 U.S. 266 (1973); U.S. v. Heredia-Castillo, 616 F.2d 1147 (9th Cir. 1980); U.S. v. Calvillo, 537 F.2d 158 (5th Cir. 1976); U.S. v. Mallides, 473 F.2d 859 (9th Cir. 1973 Roa-Rodriquez v. U.S., 410 F.2d 1206 (10th Cir. 1969).

3a/ U.S. v. Williams, 622 F.2d 830, 846-47 (5th Cir. 1980). (Decision governs in the Eleventh Circuit also because it was made before the old Fifth Circuit was divided into the current Fifth and Eleventh Circuits.

4/ Mathis v. U.S., 391 U.S. 1 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. U.S., 37 U.S. 201 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mallory v. U.S., 354 U.S. 449 (1957); McNabb v. U.S., 318 U.S. 332 (1943).

4a/ Matter of Sandoval, I.D. 2725 (BIA 1979).

5/ Wong Chung Che v. INS, 565 F.2d 166 (1st Cir. 1977).

6/ Frisbie v. Collins, 342 U.S. 519 (1952); Avila-Gallegos v. INS, 525 F.2 666, 667 (2d Cir. 1975); Guzman-Flores v. INS, 496 F.2d 1245, (7th Cir. 1974); Huerta-Cabrera v. INS, 466 F.2d 759, 761 (7th Cir. 1972); LaFran v. INS, 413 F.2d 686, 689 (2d Cir. 1969); Medeiros v. Brownell, 240 F.2d 634 (D.C... Cir. 1957); Matter of Burgos, 15 I&N Dec. 278 (BIA 1970).

7/ Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971).

8/ Butz v. Economou, 438 U.S. 478 (1978); Nixon v. Fitzgerald, 457 U.S. ___, 102 S. Ct. 2690 (1982); Harlow v. Fitzgerald, 457 U.S. ___, 102 S. Ct. 2727 (1982).

9/ Id.

10/ Id.

/ Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972) (after remand).

/ Id.; Pierson v. Ray, 386 U.S. 547 (1967); Norton v. U.S., 581 F.2d 390 (4th Cir. 1978); Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972).

/ Morales v. Hamilton, 391 F.Supp. 85 (D. Ariz. 1975). See Dupree v. Village of Hempstead, 401 F.Supp. 1398 (E.D.N.Y. 1975). That law was subsequently changed in Almeida-Sanchez v. U.S., 413 U.S. 266 (1973); U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975).

/ 28 U.S.C.A. 1346(b) (1976); 28 U.S.C.A. 2680(h) (Supp. 1978).

/ Gaudet v. U.S., 517 F.2d 1034 (5th Cir. 1975); Dupree v. Village of Hempstead, supra.

/ U.S. v. Gilman, 347 U.S. 507 (1954); U.S. v. First Sec. Bank of Utah, 206 F.2d 424 (10th Cir. 1953); Turner v. Ralston, 409 F.Supp. 1260 (W.D. Wis. 1976); Adams v. Jackel, 220 F.Supp. 764 (E.D.N.Y. 1963).

/ Pennington v. U.S., 406 F.Supp. 850 (E.D.N.Y. 1976).

1/ 18 U.S.C.A. 2234, 2235, and 2236 (1970); 18 U.S.C. 242 (1969).

1/ DOJ Order 1752.1, and Appendix 1 thereof (AM 2235 Ex. 1, pp. 11-27 and 35-46); OI 287.10.

1/ 28 C.F.R. 50.15.

1/ 28 C.F.R. 50.16.

VII. Reciprocal Responsibility (or Lack of It) of Immigration Officers and Other Law Enforcement Personnel

A. Authority of Immigration Officers to Make Searches and Seizures

1. For civil offenses and crimes under the immigration laws

Immigration officers are specifically authorized by statute to board and search, without a search warrant, within a reasonable distance from any external boundary of the United States, any vessel, aircraft, railway car, or other conveyance or vehicle in which they believe aliens are being brought into the United States. 1/ They are also authorized to enter private lands within 25 miles of any external boundary of the United States in order to patrol the border for the purpose of preventing the illegal entry of aliens into the United States. 2/ Moreover, an officer or employee of the Immigration and Naturalization Service, designated by regulation, has the power to search, without a warrant, any person seeking admission to the United States if the officer has reasonable cause to suspect that grounds for exclusion exist which would be disclosed by the search. 3/

Immigration officers may obtain search warrants pursuant to Rule 41, Federal Rules of Criminal Procedure, to search for evidence of crimes, such as smuggling, fraud, or harboring. Officers may obtain civil court orders or warrants pursuant to sections 103, 279, and 287(a)(4) of the Act where their primary purpose is to locate deportable aliens. 3a/ Such searches may be performed without a warrant or court order if consent to the search is granted by a person legally entitled to grant consent. (See V.E.2. above.)

Immigration officers have authority to seize for forfeiture any conveyance, including any vessel, vehicle, or aircraft, which is used in the commission of a violation of section 274(a) of the Act, unless the owner can establish that the unlawful act was committed by a person who had illegally acquired possession of the conveyance, or unless the conveyance is being used as a common carrier and it does not appear that the owner or other person in charge of the conveyance was a consenting party or privy to the illegal act. The statute states that any conveyance subject to seizure under this legislation may be seized without a warrant if there is probable cause to believe the conveyance has been used in violation of section 274(a) and circumstances exist where a warrant is not constitutionally required. 3b/ INS policy requires that a warrant be obtained prior to seizure, absent exigent circumstances. When probable cause exists to seize a conveyance at the time of initial encounter, the conveyance may be seized without a warrant when there is a likelihood that the conveyance will subsequently be unavailable for the execution of a warrant.

An immigration officer also has authority under section 287(a)(2) of the INA to arrest without warrant any alien who in his presence or view is entering or attempting to enter the United States in violation of any immigration law or regulation, or any alien in the United States if the officer has reason to believe that the particular alien is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest.

In addition, immigration officers are authorized, under section 287(a)(4) of the INA to arrest without warrant any person for felonies which have been committed and which are cognizable under the immigration laws if he has reason to believe that the particular person is guilty of such a felony and is likely to escape before a warrant can be obtained. Among the felonies for which an officer may make an arrest under this provision are: (1) bringing in, transporting, harboring, or aiding the entry of aliens who are not entitled to enter or remain in the United States, section 274, I&N Act; (2) illegal entry by an alien for the second or subsequent time, section 275; (3) reentry of an arrested and deported or excluded and deported alien without the advance permission of the Attorney General to reapply for admission, unless he shows that he is exempt from seeking that advance permission, section 276; (4) aiding or conspiring to aid a subversive alien to enter the United States, section 277; and (5) importing or harboring aliens for any immoral purpose, such as prostitution, section 278.

Other felonies which fall within the jurisdiction of the Service are those described in sections 242(e) and 266(d) of the INA, as well as certain ones in Title 18 of the United States Code relating to false personation, nationality and citizenship, and passports and visas. For a more complete and descriptive listing, see I&NS Investigator's Handbook, Appendix 5-5A and 5-5B; Border Patrol Handbook.

The INA also empowers immigration officers to arrest, upon warrant of the Attorney General, an alien pending determination of his deportability. 4/ Once a final order of deportation has been entered, an immigration officer may arrest the respondent for purposes of deportation. 5/

Thus, the immigration officer is given specific powers of search and seizure by the INA in both civil and criminal actions arising under the immigration laws.

2. For nonimmigration offenses

In most situations beyond those in which the statute specifically authorizes immigration officers to make searches and seizures immigration officers have the same power to search or seize persons or things as any private citizen and local law governs in those instances. Immigration officers must, therefore, act in accordance with local law in any situation where they make an arrest for a nonimmigration offense. 6/ Generally, a private person may make an arrest when a crime (felony or misdemeanor) is committed or attempted in his presence, or when the person arrested has

committed a felony, even though not in the presence of the private person. However, each immigration officer should check local law to see under what circumstances he may make arrests as a private person or as an immigration officer in the particular jurisdiction. 7/

Most immigration officers at ports of entry are designated to a as customs officers and make customs searches, not just as incidental to an immigration inspection but as an independent function. Their authority to perform customs searches depends on the terms of the cross-designation. Each immigration officer should know whether or not he himself has been specifically designated as a customs officer.

Several cases have been decided in the Fifth Circuit which hold that after a constitutional vehicle stop at a permanent checkpoint which i not the functional equivalent of the border, an immigration officer may conduct a search of the trunk of an automobile if he has probable cause to believe that a controlled substance is being transported there in violation of law. 8/

Immigration officers are encouraged to work in concert with other law enforcement personnel. It is, however, improper for immigration officers to make an immigration arrest as a subterfuge for the purpose of aiding other law enforcement officers to get around the judicial warrant procedure rather than in good faith to enforce the immigration law. 9/

Any evidence of a customs or a DEA violation, discovered in the process of a valid immigration search, may be seized by an immigration officer and turned over to the appropriate agency. Moreover, an immigration officer acting as a private citizen in those circumstances may arrest an individual upon discovering such evidence in the course of a valid immigration search. Furthermore, having made a valid arrest, either under his authority as an immigration officer or as a private citizen, an immigration officer may make a search of the arrested person and the area within his immediate reach and control in order to protect himself and others from harm from a concealed weapon and to prevent the destruction of evidenc In cases where an arrest is made prior to any search, search of the trunk of a vehicle incident to the arrest in most cases is justified if the officer reasonably believes he may find fruits or instrumentalities of the offense for which the subject was arrested. 10/

The sharing of intelligence among various enforcement agencies is encouraged, and any relevant information should be passed on to the agency having jurisdiction. For example, any information concerning the smuggling of contraband should be communicated to the Customs Service. If controlled substances are involved, the immigration officer should actively seek information concerning common routes for the smuggling of drugs, as well as the identity and the modus operandi of any person involved in bringing drugs into the United States. He should then inform the Drug Enforcement Administration.

VII. Reciprocal Responsibility (or Lack of It) of Immigration Officers and Other Law Enforcement Personnel

A. Authority of Immigration Officers to Make Searches and Seizures

/ Sections 235 (a) and 287 (a)(3) (slight differences), INA.

/ Section 287(a)(3), INA.

/ Section 287(c), INA.

a/ Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211 (D.C. Cir. 1981); cert. denied, ___U.S. ___, 102 S. Ct. 1432 (1982).

b/ Section 274(b), INA; 8 C.F.R. 274.

/ Section 242(a), INA.

/ Section 242(c), INA.

/ OI 287.1a. See U.S. v. Di Re, 332 U.S. 581 (1948); U.S. v. Viale, 312 F.2d 595, 599 (2d Cir. 1963); Monteiro v. Howard, 334 F.Supp. 411 (D.R.I. 1971).

/ See Michigan Compiled Laws of 1970, Section 764.15, as amended.

/ U.S. v. Medina, 543 F.2d 553 (5th Cir. 1976); U.S. v. McCrary, 543 F.2d 554 (5th Cir. 1976); U.S. v. Garza, 539 F.2d 381 (5th Cir. 1976); U.S. v. Torres, 537 F.2d 1299 (5th Cir. 1976).

/ Abel v. U.S., 362 U.S. 217 (1960); U.S. v. Alvarado, 321 F.2d 336 (2d Cir. 1963).

1/ Preston v. U.S., 376 U.S. 364 (1964).

B. Authority of Other Federal or Local Law Enforcement Officers to Make Searches or Seizures for Immigration Law Violations

1. For immigration criminal offenses

Many state and local police departments want to help enforce the immigration laws and have sought to find out what, if any, legal authority they have to do this. At the same time, individuals and groups of United States citizens and lawful permanent residents have expressed concern about what they view as harassment and violations of their civil rights by overzealous law enforcement agents.

Whether or not local or state law enforcement officers have legal authority to enforce the criminal provisions of the immigration laws depends upon state law, since nothing in the Constitution or federal law prohibits such enforcement. 1/ However, state laws vary. 2/

Even where state law authorizes local and state police to enforce the criminal provisions of the immigration laws, the intricacies of the law of search and seizure under the immigration laws require intensive training, which most local officers are not afforded. Moreover, the opportunities for a local or state peace officer to exercise this authority are very severely limited. 3/

In view of the limited circumstances under which a state or local peace officer could exercise state authority, if any, to make arrests under the criminal provisions of the immigration laws and because of the potential danger of harassment and violations of the civil rights of United States citizens and lawful permanent residents, the Service requests local and state police to notify the Service if they suspect criminal violations of the immigration laws, and encourages them to assist INS in the enforcement of those laws only when requested to do so by INS in specific cases.

2. For noncriminal immigration offenses

Except where Customs Officers are authorized to perform an immigration inspection at the international border, there is no authority for anyone other than an immigration officer to conduct a search or seizure for civil violations of the immigration laws. The immigration status of aliens in the United States is a matter of purely federal concern. As a result, a state or federal law enforcement officer other than an immigration officer does not have authority to arrest a person on suspicion that he is deportable, e.g., a visitor who has remained longer than authorized, or a student who is working without permission, if he is not also suspected of having committed a criminal violation. A local or state police officer should not stop and question, detain, arrest, or place an "immigration hold" on any persons not suspected of crimes, solely on the ground that they may be deportable aliens. However, upon arresting an individual for a non-immigration criminal violation, law enforcement officers are encouraged to contact the INS immediately if it is suspected that the person may be an undocumented alien so that the Service may respond appropriately.

B. Authority of Other Federal or Local Law Enforcement Officers to Make Searches or Seizures for Immigration Law Violations

Hauenstein v. Lynham, 100 U.S. 483, 490 (1880). See U.S. v. Bowdach, 561 F.2d 1160 (5th Cir. 1977).

The Attorneys General of the States of California, Texas, and Washington have determined that their respective states' law permits some local and state peace officers to make arrests for crimes arising under the immigration laws. The Attorney General of Oregon has determined that peace officers of his state have no such authority. See also U.S. v. Di Re, supra; Miller v. U.S, 357 U.S. 301 (1958); U.S. v. Rebon-Delgado, 467 F.2d 11 (9th Cir. 1972).

See section VII.A. above, regarding acts classified as felonies under laws relating to immigration and naturalization.

Misdemeanors under the Immigration and Nationality Act include the willful failure, by an alien against whom a final order of deportation has been outstanding for more than six months, to comply with the Attorney General's regulations regarding supervision, section 242(d), INA; the willful overstay by a crewman of the time allowed in a conditional landing permit, section 252(c); the failure, by any alien 18 years of age and over, to carry with him at all times his certificate of alien registration or his alien registration receipt card, section 264(e); violations of registration and fingerprinting requirements by an alien required to be registered, section 266(a), (b), and (c); and the first offense of entry without inspection, section 275.

A state or local police officer making an arrest for a violation of federal criminal law, such as the criminal provisions relating to immigration and naturalization, should, in the absence of a governing federal statute, follow the arrest procedure prescribed by the law of the state where the arrest takes place. The same is true for a federal officer who is not an immigration officer, as for example, where a Customs officer makes an arrest for a criminal violation of the immigration laws. He is not specifically authorized to make arrests under the immigration laws, but he has the same powers of arrest as a private person, and the validity of the citizen's arrest is governed by the law of the state where the arrest is made.

Under the law of most states, a peace officer has authority to arrest a person without a warrant under the following circumstances: (1) whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence, (2) when the person arrested has committed a felony, although not in the officer's presence, or (3) whenever the officer has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed. In practical terms, it is highly unlikely that a peace officer will obtain sufficient information to have

probable cause to believe that a felony under the immigration laws has been committed, and it is equally unlikely that an immigration felony or misdemeanor will be committed in the officer's presence unless the officer is patrolling the border.